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IN THE

Supreme Court of the United States

RAYMOND ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), requires the dismissal of actions against separate corporate entities for tortious commercial conduct where such entities, including the non-sovereign defendant in this case, had no immunity from suit in United States courts before the enactment of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11?

2. Whether a separate commercial entity, with no prior expectation of immunity and which gained immunity only by being defined as an "instrumentality" under the FSIA, can now use that newly conferred immunity to shield its pre-enactment conduct from redress in United States courts?

3. Whether the application of a statute to extinguish a plaintiff's pre-existing cause of action may have an impermissible retroactive effect under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), or whether only a defendant's expectations should be considered?

PARTIES TO THE PROCEEDING

Petitioners-Plaintiffs Raymonde Abrams, Nicole B. Silberkleit, Janet Herman, Lily Redner, Bernard Caron, Ernest Haar, Harry Cybulski, Yvonne Litman, Cassandra Kirby Conahay Freund, Jean Jacques Fraenkel, Liliane Lichtenstein, and Marie Weinrauch are individual persons.

Respondent-Defendant Société Nationale des Chemins de Fer Francais is a separate corporation formed under the laws of the Republic of France.

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Petitioners-Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit").

OPINION BELOW

The opinion of the Second Circuit (Appendix to Petition ("Pet. App.") at 1a) is reported at 389 F.3d 61.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit was entered on November 9, 2004. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C §§ 1330, 1602-11, are set out at Pet. App. at 31a.

STATEMENT OF THE CASE

This suit is brought on behalf of survivors deported during World War II from France to Nazi death camps on the trains of the defendant commercial corporation, Société Nationale des Chemins de Fer Français ("SNCF").[1] Relying on this Court's decisions in *Republic of Austria v. Altmann,* 541 U.S. 677, 124 S. Ct. 2240 (2004), and *Dole Food Co. v. Patrickson,* 538 U.S. 468 (2003), the United States Court of Appeals for the Second Circuit dismissed this case. Plaintiffs believe the Second Circuit's reasoning and analysis conflict with this Court's reasoning and holding in *Altmann.* Plaintiffs seek this Court's review of the Second Circuit's determination that retroactive application of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, to create immunity for SNCF's conduct during World War II is mandated by this Court's decisions in *Altmann* and *Dole.*

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[1]The United States District Court for the Eastern District of New York has jurisdiction over the claims at issue here pursuant to 28 U.S.C. §§ 1331, 1350 and 1367. *See* Pet. App. at 15a.

This case raises fundamental issues that are not addressed by *Altmann* or *Dole,* issues involving the creation of immunity for commercial corporations like SNCF and the role of settled expectations of plaintiffs in a retroactivity analysis.

Altmann does not hold that the FSIA requires immunity to be given to a separate commercial corporation that never enjoyed immunity before the FSIA. While now defined as an "instrumentality of a foreign state,"[2] prior to 1976, SNCF had always been amenable to suit in United States courts. It never had any expectation of immunity, and the government of France never expected that SNCF would be granted immunity as a gesture of comity.[3]

Altmann did not reject an analysis of the rights of injured plaintiffs, as the Second Circuit summarily did in this case. Instead, this Court found that analysis of the rights of the sovereign defendants was all that was necessary given the facts presented in *Altmann.*

Nor did *Dole* require immunity to be granted where none previously existed. At issue in *Dole* was the procedural question as to whether federal or state courts had jurisdiction over the suit, and not, as in this case, using immunity to foreclose all redress.[4] Questions of retroactivity were not relevant in that case since the acts at issue all occurred years after the enactment of the FSIA.

Neither *Altmann* nor *Dole,* nor the retroactivity analysis approved in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), creates immunity for entities like SNCF. In the context of this case against a separate corporate entity, with no right to sovereign immunity prior to 1976, and for which no sovereign has claimed any such immunity, *Altmann*'s logic

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[2]28 U.S.C. §§ 1603 (a) and (b)(2).

[3]France itself has never afforded immunity to SNCF, which has always been considered a private corporation and subject to suit under French law.

[4]Other issues in *Dole*, such as the question of a tiered subsidiary or percentage of ownership by a sovereign, are not relevant to this case.

and reasoning do not warrant dismissal as the Second Circuit found. *Landgraf* was not overruled by *Altmann* in every FSIA case as the Second Circuit holds. Under the reasoning of *Altmann*, *Landgraf* still provides the framework for determining retroactivity in cases involving settled expectations, where private rights are affected and where neither plaintiff nor defendant is a sovereign state.

For these reasons, as discussed more fully below, the Second Circuit's holding conflicts with *Altmann* and the petition for a writ of certiorari should be granted.

I. SNCF's Corporate Status and Actions.

This is not a lawsuit against a government. France is not a party to this lawsuit and has not appeared. This is a lawsuit against a separate legal entity whose shares are currently owned by a government and is based on its commercial, profit-making activities. *See* Pet. App. at 8a-9a.

SNCF is and was a separate corporation. Prior to the passage of the FSIA in 1976, SNCF was frequently sued in United States courts for wrongs related to its transportation business and appeared without claiming immunity. As a consequence of the FSIA, however, SNCF was thereafter generally rendered immune for its post-1976 conduct as an "instrumentality" of France because of the French government's ownership of shares of SNCF.

SNCF sent its first train of Jews and other "undesirables" to Auschwitz on March 27, 1942, and sent its last train on August 17, 1944. It operated 72 such convoys deporting more than 76,000 Jews; fewer than three percent survived. Included among SNCF's deportées to the death camps were 168 American, Canadian and British pilots shot down over France. SNCF scheduled the deportation trains as ordinary commercial transactions, and SNCF personnel operating the trains were ordinary employees acting in the ordinary course of business. They ran the trains and, after each trip, cleaned and disinfected the cars. The organization and operation of the deportation trains were simply a matter of routine, and SNCF was totally responsible for its acts and decisions. SNCF selected the trains, which were mostly cat-

tle cars; the "conditions inside the deportation trains were inhumane and frequently fatal." Pet. App. at 9a. The deportation trains were clearly marked, and their destinations – death camps like Dachau and Auschwitz – well known.

During World War II, SNCF "preserved its independence by collaborating with the German authorities and by accommodating their transportation needs." Pet. App. at 9a. SNCF implemented, and was paid for, the death camp deportations as a private entrepreneur under civilian control. SNCF charged per head, per kilometer, for the "services."

The fee for each of the "passengers" on the deportation trains was equivalent to the standard commercial fares for train tickets purchased by ordinary travelers, and was billed by SNCF to the Nazis quarterly in the ordinary course of business. After the liberation of Paris, SNCF had at least one unpaid bill for these trains, which it sent to the DeGaulle government for payment. The bill was duly paid.

The conduct of SNCF constitutes a violation of the law of nations, including aiding and abetting in the commission of war crimes and violations of the Nuremberg Principles. *See* Pet. App. at 8a.

II. Procedural History.

In September 2000, plaintiffs, primarily American survivors of the trains or their heirs, filed suit in the United States District Court for the Eastern District of New York, seeking to hold SNCF accountable for its actions in knowingly deporting people to Nazi concentration camps for money.

SNCF moved to dismiss Plaintiffs' complaint, claiming that it was entitled to sovereign immunity pursuant to the FSIA. Plaintiffs opposed SNCF's motion, arguing that the question of immunity should be resolved based on the law in effect at the time of the alleged acts; that SNCF, as a separate corporate entity, would have had no immunity at that time; and that therefore, applying the FSIA would be impermissibly retroactive. Plaintiffs also cross-moved for discovery, arguing that whether SNCF was entitled to immu-

nity could not be resolved based on the existing record. *See* Pet. App. at 10a.

In November 2001, the District Court granted SNCF's motion to dismiss, concluding that 28 U.S.C. § 1330 of the FSIA was the sole source of the Court's subject matter jurisdiction over Plaintiffs' claims and that none of the exceptions to foreign sovereign immunity set forth in the FSIA applied to this case. Pet. App. at 3a, 10a. The District Court also denied Plaintiffs' cross-motion for discovery. Pet. App. at 10a.

In June 2003, the United States Court of Appeals for the Second Circuit reversed and remanded in a unanimous decision, holding that the District Court had failed to do the analysis mandated by this Court in *Landgraf*, to determine if the application of the FSIA to the case at bar was impermissibly retroactive.[5] Pet. App. at 19a-23a. The Second Circuit held that application of the FSIA to grant immunity today to SNCF, if it had no such immunity prior to the enactment of the FSIA, would be impermissibly retroactive. However, because the existing record was insufficient for any such determination, discovery was required. Pet. App. at 29a-30a. The Second Circuit was thus unable to decide if the FSIA could be applied retroactively to this case, and instructed the District Court to develop the record as to whether the Plaintiffs could have had their claims adjudicated in the courts of the United States. *See* Pet. App. at 29a-30a. Discovery conducted thereafter clearly indicated that SNCF had no such immunity prior to the enactment of the FSIA.

In August 2003, SNCF petitioned this Court for a writ of certiorari. Plaintiffs opposed the petition. In June 2004, this case was remanded to the Second Circuit for reconsideration in light of *Altmann*. On remand, the Second Circuit dismissed this case on November 9, 2004, holding that the

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[5]Under *Landgraf*, a court, in evaluating the retroactivity of a statute, must determine if there is any clear Congressional intent as to its retroactivity, and if not, whether a retrospective application of the statute in question would impair rights or create liability that did not previously exist. *See Landgraf*, 511 U.S. at 280.

retroactivity analysis established in *Landgraf* was "inappropriate" and that the court was "bound by the Supreme Court's decision to defer to comity." Pet. App. at 4a, 6a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision is inconsistent with the decision and the careful reasoning of this Court in *Altmann*. The conclusion in *Altmann* was that the retroactivity analysis set forth in *Landgraf* did not control that case where the expectations of the sovereign were the focus of the analysis. *Altmann* did not overrule *Landgraf* in all cases, nor in all cases involving an entity claiming sovereign immunity. *Altmann* did not address the situation presented to the Second Circuit, where private rights and expectations, not those of a sovereign, were threatened by retroactive application of a statute which could not pass the *Landgraf* test for such retroactive reach.

The Second Circuit incorrectly interpreted *Altmann* and *Dole* to require the retroactive application of the FSIA to cases involving separate commercial corporations, as well as to those involving sovereigns. However, this Court did not address in *Altmann* or *Dole* any issue as to the retroactive application of the FSIA to claims against a separate corporate entity for its pre-FSIA conduct for which that entity had been amenable to suit as a matter of substantive law. Thus, the reasoning of this Court in *Altmann* does not lead to the broad conclusions that the Second Circuit adopted.

The Second Circuit rejected in this case any analysis of the settled expectations of plaintiffs; this position conflicts with the Third and Ninth Circuits, which do consider such expectations in a retroactivity analysis. This issue is not considered by this Court in *Altmann* at all. *Altmann* is consistent with the conclusion that the FSIA should not be applied retroactively to erase legitimate rights and expectations of private plaintiffs and immunize from justice the wrongful actions of entities that had no immunity and no expectation of immunity. Nothing in *Altmann* requires otherwise.

I, Permitting This Suit to Continue Against SNCF Is Consistent with *Altmann*'s Holding.

A. The *Landgraf* Analysis Set Forth in *Altmann*.

The Second Circuit rejected the retroactivity analysis of *Landgraf* in all cases involving the retroactive reach of the FSIA, holding that, after *Altmann*, "reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles." Pet. App at 5a. However, this Court in *Altmann* did *not* find that *Landgraf* could never apply in cases where claims of sovereign immunity are at issue. Had such a broad holding been intended, this Court need not have addressed *Landgraf* at all. Unless this Court's analysis of *Landgraf* in *Altmann* was merely an academic exercise, the Second Circuit is wrong in its conclusions that no *Landgraf* reliance interests remain to be considered after the FSIA.

Clearly recognizing the continued importance and vitality of *Landgraf* in protecting legitimate prior substantive rights from retroactive application of law unless Congress expressed specific intent to extinguish those rights, this Court began its reasoning in *Altmann* with an historical analysis of sovereign immunity to explain why the default rule in *Landgraf* did not control the outcome in *Altmann*.

As an initial matter, this Court found that sovereign immunity was neither constant substantively nor consistently applied. The application of the principles espoused in *Landgraf* were not determinative because the scope of immunity granted to the sovereign was not a matter of settled expectations based on steady application of law. Instead, the scope of the sovereign state's immunity was solely a matter of grace and comity, which could, and did, change, based on extra-legal considerations, such as foreign policy concerns.

Therefore, an analysis framed in terms of settled rights did not provide a clear answer in *Altmann*, because the flexible principles of comity granted to a foreign sovereign reflect "current political realities and relationships." *Altmann*, 124 S. Ct. at 2252 (citing *Dole*, 538 U.S. at 479). Those principles are by their nature fluid and changing, and therefore, unsettled.

Under *Landgraf,* a court must determine whether a statute would "impair rights a party possessed when the party acted, increase a party's liability for past conduct, or impose new duties." *Landgraf,* 511 U.S. at 280. If so, then the statute should not be retroactively applied. According to this Court's opinion in *Altmann*, none of these three examples of retroactivity was dispositive. Foreign governments[6] enjoyed no settled expectation in avoiding suit in a particular forum through a defense of sovereign immunity, and foreign states had no right to immunity as a matter of law, only a justifiable expectation that as a matter of comity, United States courts would grant them immunity for their public acts. *Altmann*, 124 S. Ct. at 2251-52. Thus, the *Landgraf* default rule did not definitively resolve that case. *Id.*

The Second Circuit's blanket rejection of *Landgraf* failed to take into account such reasoning. This Court went beyond the analysis mandated by *Landgraf* because such an analysis alone was not dispositive of sovereign immunity issues where defendant was a sovereign government. However, had the Second Circuit followed the same approach used by this Court in *Altmann*, it would have determined that such an analysis of the rights and expectations of the parties in this case did, in fact, provide a clear answer.

As a separate commercial entity, SNCF had no expectation of sovereign immunity for any conduct prior to 1976. SNCF itself was repeatedly sued in United States courts before enactment of the FSIA.[7] SNCF went to great, and cre-

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[6]The defendants in *Altmann* were the Republic of Austria and the Austrian Gallery (national museum), which was not a separate corporation. *See* n.11 *infra.*

[7]SNCF was sued at least seven times in United States courts between 1942 and 1975. *See Wheeler v. Société Nationale des Chemins de Fer Français,* 108 F. Supp. 652 (S.D.N.Y.1952); *Kaufman v. Société Nationale des Chemins de Fer Français,* Civil Action No. 92-130 (S.D.N.Y. Mar. 30, 1954); *Shulman v. Compagnie Generale Transatlantique,* 152 F. Supp. 833 (S.D.N.Y. 1957); *Dunajevski v. Société Nationale des Chemins de Fer Français,* 35 N.Y.S.2d 102 (City Ct. N.Y. County 1942); *Abatangelo v. Société Nationale des Chemins de*

(continued...)

ative, lengths in searching for reasons to avoid these suits.[8] In none of those cases, however, did SNCF assert, suggest or, as discovery of SNCF has shown, even consider a defense of sovereign immunity in any suit against it. In fact, SNCF has confirmed to Plaintiffs that it has no internal documents of any nature even mentioning sovereign immunity in the United States.

This lack of immunity for SNCF is consistent with at least 150 years of American jurisprudence. A corporation, even one owned by a sovereign, has always been amenable to suit when engaging in commercial activity. *E.g.*, William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 543-46 (1991). This rule of law was consistently applied from at least 1824. *Bank of the United States v. Planters Bank of Georgia*, 22 U.S. (9 Wheat) 904, 907 (1824). *See also Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397 (N.J. 1918); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929); *Coale v. Société Co-operative Suisses des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N.Y.S.2d 201, 206 (App. Div. 1940); *The Beaton Park*, 65 F. Supp. 211, 213 (W.D. Wash. 1946); *In re Aircrash Disaster Near Roselawn*, 909 F. Supp. 1083, 1108-1100 (N.D. Ill. 1995). In *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 250 n.12 (1949), this Court specifically referred to the *Deutsches Kalisyndikat* and *Coale* cases as examples of the "difference between the liabilities of foreign public or semipublic corporations and

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[7](...continued)
Fer Français, Civil Action No. 88-391 (S.D.N.Y. 1953); *Siegmeier v. Société National des Chemins de Fer Français*, 1 A.D.2d 879, 150 N.Y.S.2d 775 (1st Dep't 1956); *Fuss v. French National Railroads*, 35 Misc. 2d 680, 231 N.Y.S.2d 57 (Sup. Ct. N.Y. County), *aff'd*, 17 A.D.2d 941, 233 N.Y.S.2d 1013 (1st Dep't 1962).

[8]For example, in *Fuss v. French National Railroads*, 35 Misc. 2d at 681-84, 231 N.Y.S.2d at 58-62, SNCF's lead counsel, Murray Gurfein, argued lack of subject matter jurisdiction based on the commerce clause.

those of the foreign government to which they are related."

B. Rights of Plaintiffs Must be Considered

This Court has not found that only the rights of defendants are to be considered in determining the retroactive application of law and has not rejected the approach of the Third Circuit or the Ninth Circuit, which do, in fact, review and consider the expectations of injured plaintiffs. *See Mathews v. Kidder Peabody & Co.*, 161 F.3d 156, 170-71 (3d Cir. 1998); *Scott v. Boos*, 215 F.3d 940, 944-47 (9th Cir. 2000). Thus, the Second Circuit is in error when it held that both *Altmann* and *Dole* required that it must reject "the perspective of the injured plaintiffs." Pet. App. at 6a.

Plaintiffs' expectations were clear. Prior to the FSIA, plaintiffs would have had a right, based on law, not grace or comity, to sue SNCF for its crimes against humanity committed during World War II. The presumption against retroactivity holds where a statute would impermissibly deprive plaintiffs of a cause of action as to which they had an antecedent right and expectation. *See Mathews*, 161 F.3d at 170-71; *Scott*, 215 F.3d at 944-47. "[D]epriving plaintiffs of a claim . . . also constitutes a retroactive effect." *Mathews* 161 F.3d at 166. Where a law destroys a jurisdictional basis previously available to Plaintiffs, such a change "'speaks not just to the power of a particular court but to the substantive rights of the parties as well.'" *Id.* (quoting *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997)).

Despite this, the Second Circuit held that, because of this Court's decision in *Altmann*, it was forced to reject approaching "the situation from the perspective of the injured plaintiffs whose rights have now been altered." Pet. App. at 6a. Yet *Altmann* neither rejected nor even reviewed the rights of plaintiffs.

This Court found only that the expectations of foreign sovereigns were shaped by comity, which by its nature is changing and political. The unsettled nature of the defendant's expectations were sufficient for this Court to determine that an analysis framed in terms of *Landgraf* would not provide any answer. The historical expectations of the defen-

dant in this case are different. SNCF, as a separate entity, would not have been afforded any gesture of comity. Its expectations were always that it was amenable to suit in United States courts.

II. The Second Circuit Misapplied Principles of "Grace and Comity."

Failing to undertake the historical analysis used by this Court in *Altmann*,[9] and finding instead that it was bound by this Court's deference to comity, the Second Circuit assumed that SNCF, as an "instrumentality" under the FSIA, was entitled to the same principles of grace and comity as a sovereign. However, such reasoning is circular; it assumes retroactivity to determine retroactivity. The Second Circuit categorized SNCF as an instrumentality under the FSIA and thus entitled to comity. Because of that, any application of the FSIA to grant immunity would not be impermissibly retroactive based on the reasoning in *Altmann*. However, it is only in applying the FSIA retroactively that SNCF would be considered an instrumentality.[10] Prior to the enactment of the FSIA and at the time of the alleged acts, SNCF had no expectation of comity and no right to immunity. Indeed, nothing in the FSIA itself, or in *Altmann* or *Dole*, suggests that separate entities re-categorized as "instrumentalities of foreign states" were thereby entitled to the same comity as actual sovereign governments.

Comity is the recognition and respect that one nation affords to another nation's processes and procedures. *See Hilton v. Guyot*, 159 U.S 113, 163-64 (1895). In the classic statement of the doctrine, this Court defined comity as "'the recognition which one nation allows within its territory to the *legislative*, *executive* or *judicial* acts of another nation.'" *Société Nationale Industrielle Aerospatiale v. United States*

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[9]Such historical analysis is not the same as relying upon the State Department's past determinations, which the Second Circuit also rejected, and which plaintiffs agree is neither called for nor warranted in this case.

[10]"Instrumentality" is a term defined in the FSIA. *See* 28 U.S.C. § 1603(b)(2). Before the enactment of the FSIA, there were no foreign state "instrumentalities."

Dist. Court, 482 U.S. 522, 544 n.29 (1987) (quoting *Hilton*, 159 U.S. at 163-64) (emphasis added). *See also Restatement (Third) of the Foreign Relations Law of the United States* § 101e (1987). It is "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aerospatiale*, 482 U.S. at 543 n.27. "Comity of nations" is the recognition afforded to another nation's jurisdiction to prescribe laws. *See Hartford Fire Ins. Co v. California*, 509 U.S. 764, 798, 816 (1993).

SNCF is a commercial corporation. It enacts no laws and issues no regulations. The French government is not seeking to address any wrongs committed by SNCF, and the government of France has not appeared in this proceeding.

Moreover, this Court confirmed in *Altmann* that "*Landgraf*'s retroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context." *Altmann*, 124 S. Ct. at 2252 (citing *Landgraf*). In *Altmann*, defendants were a sovereign government and the Austrian Gallery, which was not a separate corporate entity.[11]

The plaintiffs here are individuals who were on the trains themselves, or the heirs of such individuals. They are clearly not asserting sovereign interests. Nor is SNCF. The defendant is a commercial corporation which ran the deportation trains for profit and today earns millions of dollars in the United States from the retail sale of train tickets. And indeed, SNCF's own settled expectations, as proved by its consistent failure to claim immunity when repeatedly sued in United States courts, show that both it and France, which never sought a suggestion of immunity from the State Department, considered SNCF's rights to be essentially private.

Neither the facts of *Altmann* nor the opinion treats at all the settled expectations or amenability to suit of separate corporate entities engaged in commercial activities, which were

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[11] Unlike SNCF, the Austrian Gallery (a national museum of the Republic of Austria) is not a corporation and issues no stock. *See* Brief for Petitioners at ii, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004) (No. 03-13).

never based on principles of comity, but rather on more than 150 years of jurisprudence that separate entities were always amenable to suit. No deference to comity in this case is appropriate, and the Second Circuit's reliance on such principles is in error.

III. *Dole Food Co v. Patrickson*, 538 U.S. 468 (2003), Is Not Dispositive of This Case.

In dismissing this case, the Second Circuit also mistakenly relied on *Dole*. This Court's references to *Dole* in *Altmann* do not warrant the dismissal of this case on sovereign immunity grounds. The facts and holding of *Dole*, which raise no issue as to retroactivity, are not analogous to the issues in this case, and provide no guidance in resolving these issues. *Dole* dealt neither with the substantive reach of immunity nor the retroactivity of a statute, and the Second Circuit was wrong in holding that *Dole* requires that a separate corporate entity be given immunity for commercial conduct that predates the enactment of the FSIA.

In fact, no question of substantive law was presented to this Court in *Dole*, and no party's substantive rights were in jeopardy. *Dole* dealt solely with post-FSIA conduct and the issue of when "instrumentality" status under the FSIA should be determined. Under 28 U.S.C. § 1330 of the FSIA, federal courts are granted jurisdiction over "instrumentalities." Preferring federal jurisdiction, the defendants in *Dole* sought a determination as to when instrumentality status should be determined in seeking removal from state court. Indeed, this Court in *Dole* did not mention *Landgraf* at all. Therefore, *Dole* concerned the purely procedural question of whether or not that case could be removed from state court to federal court in a suit based on post-FSIA conduct.

Moreover, *Dole* did not consider whether retroactive application of the FSIA would improperly impair existing rights and settled interests under *Landgraf*. No question was raised of completely depriving plaintiffs of substantive rights and plaintiffs' right to assert claims in United States courts was never in jeopardy. The only effect of this Court's ruling in *Dole* was to require that the suit proceed in state court, as opposed to federal court.

IV. The Reasoning of *Altmann*, Which Requires Retroactive Application of the FSIA to a Sovereign Government, Does Not Justify Retroactive Immunization of a Separate Corporation Like SNCF

Altmann and *Dole* enhance the level of comity between the United States and the governments of other countries, because, consistent with the two principal purposes of the FSIA, they help to "clarify[] the rules that judges should apply in resolving sovereign immunity claims and eliminat[e] political participation in the resolution of such claims." *Altmann*, 124 S. Ct. at 2253. Thus, *Altmann* and *Dole* interpret the FSIA as offering clarity to sovereign governments regarding, respectively, their own (post-1976) potential exposure to U.S. federal court jurisdiction (*Altmann*), and the exposure from that date of those separate entities newly re-defined by 28 U.S.C. § 1603(b)(2) as facing similar risks and having entitlement to "some" immunity (*Dole*). Neither *Altmann* nor *Dole*, both of which are distinguishable on their facts from the case at bar, locates a legislative intent to benefit separate corporate entities as such, for which the principle of comity was never intended to apply. Neither case leads to the conclusion that this Court has found in the FSIA the intent to cloak with immunity for pre-1976 conduct those separate and independent entities newly re-configured as "instrumentalities" by the statute. Instead, this Court's emphasis is on comity to sovereign governments.[12]

Foreign governments have always been able to claim immunity, although the scope of that claim has varied considerably over the years, based substantially on foreign policy concerns and the consequent application of grace and comity, as opposed to a settled rule of law. Thus, while foreign governments always have an interest and a claim to immunity, they have no fixed and settled expectation of precisely what

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[12] The design of the FSIA is "henceforth" to immunize actual sovereign governments for conduct, whenever occurring, not covered by a statutory exception, and to alert them from 1976 on as to which of their related entities will "henceforth" be either immunized or excepted from immunity for post-1976 conduct.

the scope of that immunity will be. It is reasonable then to conclude, as *Altmann* does, that the sovereign must accept the intrinsic fluidity of the situation, which includes the potential retroactive reach of newly-promulgated rules on the scope of immunity. It is quite another thing to say – and we submit *Altmann* did not say – that the FSIA should be retroactively applied to immunize *non-sovereigns* for acts for which they had always been liable as a matter of settled law.[13]

Neither the FSIA, nor the holdings of this Court in *Altmann* or *Dole*, deal with the situation at bar, namely, the potentially retroactive application of radically changed legal principles to the conduct of a separate corporate entity long before enactment of the FSIA, defined as an "instrumentality" in 1976, and now being sued for its pre-1976 actions as a separate corporate entity.[14] By material contrast, though, one hundred fifty years of consistent jurisprudence hold that SNCF was always amenable to suit for conduct pre-dating the enactment of the FSIA. And SNCF's own actual expectations in this regard are not a matter of conjecture; SNCF never claimed immunity despite being sued repeatedly in the United States courts.

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[13]Such a result would be inconsistent with the expressed Congressional intent in enacting the FSIA to clarify and codify then-existing sovereign immunity law. *See Altmann*, 124 S. Ct. at 2249.

[14]The majority opinion in *Altmann* mentions *Dole*, among other cases, to support its holding that the FSIA was intended to apply to pre-enactment conduct. *Altmann*, 124 S. Ct. at 2253. But, that the FSIA is held to apply to pre-enactment conduct of sovereigns does not mean that it applies to pre-enactment conduct of separate corporate entities that were amenable to suit at that time. Indeed, to the extent that "conduct" is considered in *Dole*, it is solely that of the sovereign. Respectfully, neither the facts of *Dole* which involved no pre-enactment conduct, nor its holding, so require.

CONCLUSION

SNCF, as a private actor with no historical right to sovereign immunity, does not come within the holding of *Altmann*, which neither considered nor decided anything about the way a separate corporate entity would have been treated before enactment of the FSIA. *Altmann* does not require the retroactive application of the FSIA to pre-FSIA conduct by entities whose commercial conduct was never previously subject to immunity. *Altmann* does not reject the validity of considering the rights of plaintiffs in determining the retroactive reach of a statute. In this case, the Second Circuit should have conducted a *Landgraf* analysis consistent with the Court's action in *Altmann*. Such analysis would have found, for the reasons set forth above, that the FSIA is not retroactive to private entities and should not be used to create immunity for events preceding its enactment. The Second Circuit was wrong in dismissing this case.

For all these reasons, the petition for certiorari should be granted.

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